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*Beverly Smith*

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tax court

ATTORNEYS FOR APPELLEE:

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**IN THE  
COURT OF APPEALS OF INDIANA**

No. 49A02-0712-CR-1107

STATE OF INDIANA,  
Appellee-Plaintiff.

**August 6, 2008**

**KIRSCH, Judge**

Mitchell Jackson appeals his convictions for robbery<sup>1</sup> as a Class C felony, and criminal confinement<sup>2</sup> as a Class D felony after a bench trial. He raises the following restated issue: whether the actions of the trial court prevented Jackson from receiving a fair trial and due process of law.

### **FACTS AND PROCEDURAL HISTORY**

On February 12, 2007, two men entered the First Federal Bankcorp in Indianapolis. Both men wore fully zipped hooded jackets. One of them, Rockean Bryant, approached the counter, while the other, Jackson, stayed near the entrance. Bryant placed a note and a plastic bag on the counter. He kept one hand in his pocket, leading the teller to believe that he was armed. During the robbery Bryant made bank employees lie on the ground. Then both men fled the scene. They were arrested shortly afterward, and Jackson was charged with robbery and criminal confinement.

Jackson waived his right to a jury trial. Following his conviction for robbery and criminal confinement the trial court sentenced him to four years and one and one-half year, respectively to be served concurrently. Jackson now appeals.

### **DISCUSSION AND DECISION**

Jackson argues that the trial judge's comments and questions during trial violated his right to due process of law and a fair trial. *Appellant's Br.* at 3. The State argues that Jackson waived any appeal on that issue because he did not object to the comments at trial.

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<sup>1</sup> See IC 35-42-5-1.

<sup>2</sup> See IC 35-42-3-3.

*Appellee's Br.* at 4.

When a defendant fails to object to comments a trial judge makes during trial, the issue is deemed waived for review. *Flowers v. State*, 738 N.E.2d 1051, 1061 (Ind. 2000). In order to avoid waiver, Jackson argues that a biased judge creates a fundamental error. *Appellant's Br.* at 4. If an error is considered fundamental, this court can circumvent the waiver doctrine and consider the issue. *Carter v. State*, 754 N.E.2d 877, 881 (Ind. 2001). “A fundamental error is a substantial, blatant violation of basic principles of due process rendering the trial unfair to the defendant.” *Id.* Furthermore, an impartial judge is deemed an essential element of due process. *Rosendaul*, 864 N.E.2d 1110, 1115 (Ind. Ct. App. 2007). Therefore, the comments made by the judge must be examined to determine if a fundamental error exists.

When the impartiality of a trial judge is challenged on appeal, this court presumes that the judge is unbiased and unprejudiced. *Smith v. State*, 770 N.E.2d 818, 823 (Ind. 2002). To override that presumption, a defendant must establish actual bias or prejudice through the judge's conduct. *Id.*

Trial judges have a duty to conduct trials in a manner designed to promote truth, fairness, and economy of time. *Hackney v. State*, 649 N.E.2d 690, 693 (Ind. Ct. App. 1995). Judges also have wide latitude to manage the activities in the courtroom and to maintain discipline and control during the course of the trial. *Stellwag v. State*, 854 N.E.2d 64, 68 (Ind. Ct. App. 2006). A judge may, in his or her discretion, ask questions that will aid the fact-finding process. *Ware v. State*, 560 N.E.2d 536, 539 (Ind. Ct. App. 1990). Additionally, a judge's discretion to ask questions is greater in bench trials. *Id.* During a bench trial the

judge may ask questions of witnesses to aid in the fact-finding process, so long as the questioning is done in an impartial manner and does not prejudice the defendant. *Jones v. State*, 847 N.E.2d 190, 198 (Ind. Ct. App. 2006).

Here, Jackson first objects to the trial judge asking the State to recall a witness so the court could ask the witness further questions. *Appellant's Br.* at 5. In his brief, however Jackson admits, "The questioning itself was not particularly prejudicial to Mr. Jackson . . . ." *Id.* We agree and we find nothing prejudicial about the court's questions.

Jackson also claims that the judge improperly made objections on behalf of the State. *Id.* Judges have a duty to remain impartial and refrain from unnecessary remarks, but they may make impartial statements about the general admissibility of evidence. *Norcutt v. State*, 633 N.E.2d 270, 273 (Ind. Ct. App. 1994). To determine whether the comments were prejudicial to Jackson we look to the court's conduct and statements:

Defense: In other words, the other person is just standing around; right?

Witness: In a lot of cases. A lot of times both will come to the counter.

Defense: But if both aren't standing at the counter, you don't even know if that other person is paying any attention; right?

Prosecutor: Objection. Calls for speculation.

The Court: Why do we have to go further with this? It's common sense. People are going to be standing around. They might be paying attention, might not. Who knows?

*Tr.* at 67. Later, when Jackson was attempting to admit Defendant's Exhibit B (an ATM card) into evidence the court asked, "What's the relevance? She said she didn't find that, so

I’ve heard nothing to indicate it has anything to do with this case.” *Id.* at 91. After a proper foundation had been laid, Defendant’s Exhibit B was entered into evidence. *Id.* at 119.

Later, while Jackson was testifying on direct examination the following exchange occurred:

Defense: What would you do *today* if that happened?

The Court: Is there any relevance to that?

Defense: Not really. Except for his state of mind, I guess, at the time, is why I’m asking those questions. His state of mind.

The Court: You got that. But today’s state of mind is not really relevant.

*Id.* at 141 (emphasis added).

When managing a criminal trial, a judge has “the authority to make impartial statements about the general admissibility of evidence.” *Norcutt*, 633 N.E.2d at 273. We find nothing in the trial judge’s comments that suggests partiality or prejudice. We find that, at most, the trial judge’s comments reflect a desire to keep the proceedings moving at an efficient pace and, perhaps, some impatience. “[W]here the trial court’s remarks display a degree of impatience, if in the context of a particular trial they do not impart an appearance of partiality, they may be permissible to promote an orderly progression of events at trial.” *Marcum v. State*, 725 N.E.2d 852, 856 (Ind. 2000). Here, none of the trial judge’s comments demonstrate prejudice; instead, they appear designed to either keep the trial moving efficiently or to clarify the court’s own fact-finding. Therefore, we conclude that Jackson received a fair trial and find no error, fundamental or otherwise.

Affirmed.

VAIDIK, J., and CRONE, J., concur.